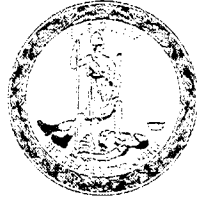


TENTH JUDICIAL CIRCUIT
OF VIRGINIA

J. WILLIAM WATSON, JR.
JUDGE



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February 3, 2021

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In re: Letter Opinion
Richard Hawkins, Plaintiff vs. Town of South Hill, Defendant
Mecklenburg County Circuit Court Case No.: CL20000144-00

Counsel:

I want to commence this opinion by thanking each of you for your professionalism and the manner, in which, these issues were presented to the Court. As I indicated in our initial hearing, this Court has had only limited experience in this area and your submissions with authority and comments during argument were invaluable. I have learned that Plaintiffs in these matters need a good deal of clairvoyance, while defense counsel need the talents of a good movie trailer producer, that is; the ability to describe enough of what's coming without giving away the plot or surprise ending. The final component is the Court rendering thoughtful opinions as to documents it may not order revealed.

This Court appreciates the log created by counsel for the Town of South Hill. This, in this Court's opinion, will insure the opportunity for meaningful review

by both sides if desired. The ultimate limiting of the documents in question by the Plaintiff did much to crystalize the issues which this Court needed to address.

STATEMENT OF FACTS

This matter was brought on by Plaintiff, hereinafter referred to as "Hawkins", seeking an order of mandamus requiring the Defendant, hereinafter referred to as "The Town", to produce documents requested under Virginia's Freedom of Information Act. The Town filed a demurrer and a motion craving over which were satisfactorily resolved by Hawkins' significantly limiting the number of documents sought. This Court finally directed the Town to create a log of all documents withheld and the reasons therefore, which log is contained in the record of this case. After the log was filed, a hearing was held to determine which if any of these documents would be reviewed on an in-camera basis. That determination being made, Hawkins and The Town each submitted argument and authority relating to their respective positions as to each document to be reviewed.

The documents which are the subject matter of this opinion are contained in the Town's Log. They will be referenced as appearing in the Town's Log, although by so referencing the Court is not agreeing the Town's characterizations thereof. They are as follows:

- 1) A seven-page demand letter from an attorney to James Butts (Town Attorney) regarding Town employee's complaints of employment discrimination and pending EEOC Charge (Log p. 7).
- 2) A one-page undated petition to the Personnel Committee for the Town from 7 Town employees requesting a meeting to discuss employment concerns and complaints about the Town Manager. (Log p. 8)
- 3) A six-page email from Town employee to Mayor Marion and Council regarding a disciplinary action taken against the employee and forwarding the disciplinary memo and rebuttal thereto. (Log p. 9).
- 4) A three-page unsigned typed document believed to have been received by Mayor Marion on or about 8/21/2019 that asserts complaints about performances of the Town Manager and the work environment at the Town Hall (Log p. 9).
- 5) One-page resignation letter of Katherine Bigelow (Log p. 10).
- 6) One-page resignation letter of Karen Lambert. (Log p. 10).

- 7) Ten-page resignation letter of Bill Wilson, which includes performance evaluation and rebuttal thereto. (Log. P. 10).

RULING AS TO EACH DOCUMENT IN QUESTION

Having carefully reviewed each document included in the above list and after considering all submissions, authority, and arguments of counsel, The Court finds as follows:

DOCUMENT ONE: THE DEMAND LETTER

This document, in its entirety, is exempt for the reasons set forth by the Town in the record of this case.

DOCUMENT TWO: THE PETITION

Ironically, this very brief document posed the most difficulty to this Court. The Town cites as its rationale for withholding this document, that it is "personnel information concerning identifiable individuals", Section 2.2-3705.1(I) Code of Virginia, as amended. Secondly, the Town cites two Va. FOIA Advisory Opinions discussing exemptions for "complaints filed against a public employee". Va. FOI Adv. Counsel AO-04-03 (Feb 14, 2003) and Va. FOI Adv. Council AO-14-00 (Dec. 12, 2000).

The first advisory opinion, AO-04-03, deals with a quality of work environment survey completed by the employees of the City of Virginia Beach. Most of the survey focused on questions concerning general work environment issues and did not ask questions concerning particular employees. The surveys did contain a comments section in which some respondents commented about identifiable employees or officials, which comments, concerned the job performances of those identifiable individuals. These comments were forwarded to the appropriate supervisors for review and, if necessary, action.

The second opinion AO-14-00 deals with a request for the number of complaints filed against two recent fire chiefs in Norfolk

Hawkins counters by citing Code Section 2.2-3704.01 of the Code of Virginia, as amended and noting that it was enacted *after* the Advisory Opinions cited by the Town. Hawkins emphasizes the preferably of redaction to total exclusion. The Town acknowledges the changes made to the applicable sections of the Freedom of Information in 2016 and 2017:

Petitioner argues that the 2016 change to the VFOIA is dispositive of the issue such that the records should be produced. Prior to 2016, the operative exemption provided: "The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

1. Personnel records containing information concerning identifiable individuals, except that access shall not be denied to the person who is the subject thereof. Any person who is the subject of any personnel record and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are waived, the public body shall open such records for inspection and copying.

Va. Code Section 2.2-3705.1(1) (2015)

Changes were made in 2016, and the statute was again amended in 2017. The operative language now reads:

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with Section 2.2-3704.01.

1. Personnel information concerning identifiable individuals, except that access shall not be denied to the person who is the subject thereof. Any person who is the subject of such information and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, such information shall be disclosed. Nothing in this subdivision shall be construed to authorize the withholding of any resumes or applications submitted by persons who are appointed by the Governor pursuant to Section 2.2-106 or 2.2-107.

No provision of this chapter or any provisions of Chapter 38 (Section 2.2-3800 et seq.) shall be construed as denying the public access to (i) contracts between a public body and its officers or employees, other than contracts settling public employee employment disputes held confidential under Section 2.2-3705.1; (ii) records of the name position, job

classification, official salary, or rate of pay and records of the allowances or reimbursements for expenses paid to, any officer, official, or employee of a public body; or (iii) the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees. The provisions of this subdivision, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is less than \$10,000 or less. Va. Code Sections 2-2-3705.1(1) (2017). (Town's Reply in Support pages 1 and 2.)

Both parties agree there is no definition of "personnel records" now "personnel information" in the statute nor has the same been defined by the Virginia Supreme Court. The Town references definitions offered by two Circuit Court Opinions:

This Court considers "personnel records" as records of or pertaining to a specific identifiable, {government} employee and touching directly upon that individual's performance, discipline, attendance, income, social security number, tax-related matters, personal background, circumstances and education, and other information bearing upon the individual's employment relationship with {the government} and for which wither the employee or the government may have a reasonable expectation of confidentiality. Virginia-Pilot Media Cos., LLC v City of Norfolk Sch. Bd, 81 Va. Cir. 450 (Norfolk Cir. Ct 2010).

The Fairfax Circuit Court opined:

All information gathered about an employee's employment in a permanent form constitutes a personnel record. McChrystal v Fairfax County Bd. Of Super., 67 Va. Cir. 171 (Fairfax Cir. Ct. 2005).

While these definitions predate the above referenced amendments to the statute, The Town argues there is no reason to believe "personnel information" has a different meaning than "personnel record" See Reply in Support of Log of Documents Withheld p. 3. A cursory review of the legislative history demonstrates the amendments were in response to Virginia Department of Corrections v Scott A. Surovell, 290 Va. 255, 776 S.E.2d 579 (2015). The amendments set forth the presently existing rule of redaction.

No provision of this chapter is intended, nor shall it be construed or applied, to authorize a public body to withhold a public record in its entirety on the grounds that some portion

of the public record is excluded from disclosure by this chapter or by any other provision of law. A public record may be withheld from disclosure in its entirety only to the extent that an exclusion from disclosure under this chapter or other provision of law applies to the entire content of the public record. Otherwise, only those portions of the public record containing information subject to an exclusion under this chapter or other provision of law may be withheld, and all portions of the public record that are not excluded shall be disclosed. Section 2.2-3704.01 Code of Va. as amended.

This having been said, this Court finds it difficult to find any type of binding or persuasive authority for the treatment of the document in question. Each document is a study in and to itself. The Court has not been offered nor has it found any authority directly on point in relation to Document Two.

The first question then becomes does this document contain "personnel information"? A careful examination reveals it does not. Applying the Circuit Court of Norfolk's pre amendment definition of "personnel records" the information must pertain to an identifiable, [government] employee and touch directly upon that employee's performance, discipline, attendance, income, social security number, tax-related matters, personal background, circumstances and education, and other information bearing upon the individual's employment relationship with [the government] and for which either the employee or the government must have a reasonable expectation of confidentiality in and to the information.

The document in question is a request for a meeting of some type addressed to the Personnel Committee of the Town of South Hill, the Chairman of the Committee and the Mayor. The request itself contains no direct or specific criticisms of anyone. While the employees who signed the request mention "concerns" in the "workplace environment", those concerns are not set forth. This document is a far cry from those that were the subject of the FOIA Advisory opinions cited herein.

It is also important to note that this document is signed by 7 individuals listed in the document as employees. All signed the single page document. The clear inference is each knew that the other was requesting this meeting. This is a group request not one by an individual employee who was seeking to keep the request confidential. It contains no personal information. No job titles are set forth, no social security numbers provided, no addresses, tax information, employee evaluations or anything else that could be deemed to be personal in nature. While the document suggests the meeting be in a private setting, there is no specific request for confidentiality in relation to the request itself.

No facts relating to potential workplace concerns are contained in this document. This request does not seem, nor is there any evidence in the record indicating it was made pursuant to established protocol such as a grievance procedure or any other formalized communication procedure. Indeed, there is nothing to indicate the request is being made as a matter of right but is to be held, if at all, at the recipient's indulgence. The title of the actual document does not reference any specific grievance procedure or any other protocol for such existing under the Town Charter, Town Code, or the Code of Virginia as amended. As a matter of fact, the meeting is also requested to be held in a non-traditional setting.

The exemption fails even under the very broad Fairfax definition. This court does not adopt. Is this request, "information gathered about an employee's employment in a permanent form"? Clearly it is not. There are no specific references to any problem presently existing in reference to any of the seven employee's present situation. Nor are there any specific complaints lodged against the individual about whom these employees had "concerns". Certainly, this document does not belong in the personnel files of the seven employees, nor in that of the individual about whom the meeting was requested. It could not have any meaningful impact on the employment relationship of any of the individuals in question.

It is also noteworthy that these employees attempted to avail themselves of an extracurricular private meeting. This seems contrary to the express purpose of the Act which requires openness and transparency. Section 2.2-3700 Code of VA, as amended. This Court does not believe that conduct, even if well-intended, should be shielded from public scrutiny. If this document is exempt, then every sticky note on a supervisor's desk indicating an employee wants to discuss, after working hours, a problem he or she is having with another employee is "personnel information". If that occurs, the exemption has clearly swallowed the rule.

As indicated above, there are no specific complaints of misconduct alleged in this request and therefore the second prong of the Town's argument fails.

After studying the statute and applicable authority it seems that "personnel information" should be defined simply as:

All information necessarily compiled and held by an employer, concerning an identifiable employee, which information directly relates to the commencement, continuation or termination of the employment relationship.

This definition is not as limited as the "Norfolk" definition nor as broad as the "Fairfax" one. Information should be required to be provided in some way as

being necessary to either establish, continue or terminate the employment relationship. Even under this definition the document in question is not exempt.

DOCUMENT THREE: EMAIL FROM TOWN EMPLOYEE TO MAYOR MARION AND COUNCIL

This document is exempt in its entirety for reasons stated by the Town in the record of this case.

DOCUMENT FOUR: UNSIGNED TYPED DOCUMENT

This document is a rambling unsigned email. This Court's review indicates it does not have a heading, nor can this Court discern to whom it was addressed. The Town "believes" it was received by Mayor Marion on 8/21/2019. The lack of information concerning this document is troubling and makes a difficult decision even more so.

The Town claims exemption pursuant to 2.2-3705.1(I) and the two previously referenced FOI Advisory opinions relating to complaints.

After a very careful review of this document the Court finds that it should be released with redactions. Many portions of this email simply set forth what appears to be a recipe for good employee relations. In many paragraphs there are no references to specific employees or specific employment situations. There are, however, numerous specific complaints about the performance of the town manager. It is difficult for this court to believe an email of this type, undated, unaddressed and unsigned, could find its way into the employees personnel file, or impact the employee in any significant way.

These specific criticisms, however, justify redaction. The document shall be produced in its entirety except as follows:

Commencing with the word "It" in the third paragraph on what appears to be page two through the next to last paragraph ending with the word "decision" on what appears to be page three. The last paragraph of the email is also to be produced.

DOCUMENT FIVE: RESIGNATION OF KATHERINE BIGELOW

This document is exempt in its entirety for reasons stated by the Town in the record of this case.

DOCUMENT SIX: RESIGNATION OF KAREN LAMBERT

This document is exempt in its entirety for reasons stated by the Town in the record of this case.

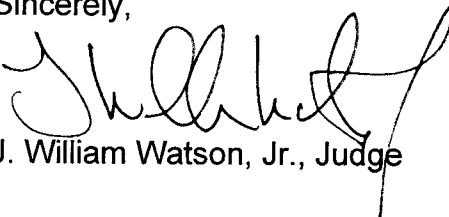
DOCUMENT SEVEN: RESIGNATION OF BILL WILSON WITH ATTACHMENTS

These documents are exempt in their entirety for reasons stated by the town in the record of this case.

Therefore, the mandamus shall issue to the Town as ordered in this case. Having said that, this Court finds that the Town has been remarkably responsive to the numerous requests made by the Plaintiff and the issuance of an order in compliance with this opinion is not an indication otherwise. I am not sure who to ask to prepare the order. The Court agreed with the Town's positions more than it did not so I would kindly request Ms. York to prepare the order with her objections and forward it to Mr. Hawkins for his. I also believe it would be appropriate to have the order effective a date late enough for appeals to be noted and the judgment suspended if that is requested.

I have enjoyed being involved in this most interesting case and thank you for your efforts on behalf of your clients.

Sincerely,

A handwritten signature in cursive script, appearing to read "J. William Watson, Jr.", written in black ink.

J. William Watson, Jr., Judge

JWW,Jr./pic

cc: Hon. Michelle G. Gordon, Clerk